IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 11 OF 2018
(High Court HBT 2 of 2016)
(Tribunal appeals 4 and 5 of 2007)

BETWEEN	:	MALCOLM GRIFFITH BRAIN AND JOHN STEWART HILL
		Appellants
AND	:	CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS AUTHORITY
		Respondent
Coram	:	Calanchini P Chandra JA Jameel JA
Counsel	:	Mr J Apted with Ms W Chen for the Appellants Mr I Verebalavu for the Respondent
Date of Hearing	:	18 February 2019
Date of Judgment	:	8 March 2019

JUDGMENT

Calanchini P

[1] This is an appeal from a Judgment of the High Court sitting as the Tax Court under section 90 of the Tax Administration Act 2009. The right to appeal to this Court from a

judgment of the Tax Court is found in section 108 of the same Act. The judgment of the Tax Court delivered on 22 January 2018 dismissed the appellants' appeal against the decision of the Tax Tribunal and upheld the respondent's assessment of income tax against each of the appellants. The decision of the Tax Tribunal had been delivered on 31 January 2012. The Tribunal concluded that the income arising from the sale of shares was caught by the general definition of total income in section 11 of the Income Tax Act Cap 201 (repealed) as well as specifically by what is in fact the third limb of section 11(a) of the Income Tax Act. The respondent in a series of tax assessments imposed on each tax payer a tax liability of $1.46m against the profit derived from the sale of shares in the company Chater Properties Ltd (CPL).

[2] It should be noted that the judgment of the Tax Court sitting as a division of the High Court was given in the exercise of its appellate jurisdiction under sections 91 and 107 of the Tax Administration Act. Consequently any appeal lies to the Court of Appeal on a question of law only under section 3(4) of the Court of Appeal Act 1949 (the Act).

[3] The background facts to the respondent's assessment of income tax payable on the sale of the appellants' shares in Chater Properties Ltd (CPL) were clearly set out in written submissions filed by the appellants in the appeal before the Tax Court. It would appear that the respondent in written submissions filed in the Tax Court has accepted and adopted that summary of the facts accepted by the Tax Tribunal. It is therefore convenient to extract from the appellant's submissions to the Tax Court the material that is relevant to this appeal.

[4] The appellants acquired shares in CPL in 1981 as part of the acquisition of a piece of land by another company of which the appellants were co-owners and directors known as J S Hills and Associates Limited. CPL was from that time until the sale of the shares, held initially indirectly and later directly in equal shares by the appellants. The initial purpose of CPL was as an investment company, but later became property development.

"In 1995, CPL acquired for $300,000 two parcels of land comprising islands, mangrove and foreshore under a Crown Lease together with another Crown Lease in Western Fiji. For convenience, we refer to this land as the "Vulani land". They acquired the land on a mortgage sale from ANZ. The Leases required the lessee to reclaim and develop the land for hotels, residential and related purposes in 3 phases. Between 1995 and the Appellant's disposal of their shares in CPL in July 2006 eleven years later, CPL expended $4.2 million on various aspects associated with the integrated development of the land. The work included environmental and planning approvals, payment of royalties for the site, preparation works, laying of seawalls, establishment of a 25,000 tree nursery.

JS Hill provided 10% of the supervising and leading hands on the project works and 10% of the sub-contractors. One of the Appellants, Mr Brain, was the Operations Manager for the Vulani land project, but he did not have to be on site for any period of time. The Appellants also engage resort development finance experts to assist in finding investors for the project and had favourable discussions with then Government ministers for legislative amendments to provide for investment incentives to support the attraction of investors. Although the Tribunal made no specific findings on this aspect, the Appellants' evidence was that before legislation could be introduced, the Government with whom they had been dealing, lost office in the general election of 1999. Shortly after that, the new Government was overthrown by George Speight in the 2000 coup, which dramatically affected tourism and investor confidence in Fiji.

It was an agreed fact that in 2000, the Appellants both suffered critical illness. One of them, Mr Brain was advised to retire. The Appellants nevertheless continued to develop the project and try to find investors through proposals and marketing documents. In 2006, the Appellants sold all their shares in CPL to an unrelated entity for a total of $12,850,000 including a late settlement penalty. It provided that the price for the Appellants' shares was $9,750,000 plus a payment of $3,000,000 to JS Hill for an assignment of the debt of $3 million owed by CPL to JS Hill for the works. The net return to the Appellants for their shares was $9,750,000 or $4,875,000 each.

The Appellants' evidence was that the Vulani land was the only asset held by CPL. The share sale took place 24 years after they acquired the shares in CPL and 11 years after CPL had acquired the Vulani land. The Respondent initially assessed the Appellants to income tax on the profit on the sale of their shares on the basis that "they were engaged in a scheme of dealing in properties devised for the purposes of making profits from renting and sales of real properties". However, the evidence was that Appellants were not personally involved in any real estate ventures. All land transactions had been carried out by their company JS Hill and in each case, JS Hill's profit on any sale of property had been treated by the Respondent as a capital gain, and not as income. The Appellants retired in 2007. A key issue is contention before the Tribunal was the purpose for which the Vulani land was acquired. The Appellants had contended that their purpose at the time of acquiring their shares and the land had not been to sell the shares or the land. Instead, their purpose had been to develop an integrated resort, but this purpose had been thwarted by the difficulties that they encountered in finding investors

and ill health, and they therefore abandoned their dream resulting the sale of their shares in CPL.

The Respondent had contended to the contrary that the Appellants had always intended to develop the land to add value, and then sell the shares at a profit. The Respondent relied on a claimed lack of a feasibility study and financial support at time the Vulani land was acquired. For reasons, which will become apparent below, this was to support a contention that the Appellants were engaged in a "scheme or undertaking" which was subject to income tax under section 11(a) of the Income Tax Act (Cap 201) (repealed). The Tribunal, however, accepted the Appellants' evidence that their purpose in acquiring the Vulani land was "to develop a site like Denarau, but picking the good things out." "It was to integrate hotels with common facilities". It was to be a 15 year dream." The Tribunal also accepted that there had been an original feasibility study for the project acquired from the previous owners, but it had been disposed of after the Appellants retired. The Tribunal noted evidence from Mr Hill that his reason for selling his shares in CPL included the tourist industry had not picked up (after the 2000 coup), he had spent all available surplus cash and because the Appellants were by then in their 60's, the dream had soured. Mr Brain, in giving his reasons, told the Tribunal "the whole thing had become a disaster. Vitally, at para 89 of the Judgment, the Tribunal specifically found that "the purpose of Taxpayers A and B was to develop an integrated resort. That had become the business of Company C."

[5] The appellants were initially assessed to pay income tax in the amount of $1.46m each on the profit from the sale of their shares in CPL. The amount ultimately assessed by the respondent was income tax of $1,255,394.55 for each appellant.

[6] The assessment was made under section 11 and proviso (a) to section 11 (section 11(a)) of the Income Tax Act Cap 201. The charging provisions of that Act were subsequently repealed by the Income Tax Act 2015. This appeal is concerned with sections 11 and 11(a) of the Income Tax Act Cap 201. Section 11 provides the definition of '*total income*' that was subject to income tax under the Act. The section contained a general definition of total income which was then followed by a number of provisos which had the effect of widening the definition for specific activities. This appeal is concerned only with the general definition of total income and proviso (a) to section 11 concerning the profit or gain from the disposal of real or personal property. Section 11 so far as is relevant and proviso (a) state:

*"11. For the purpose or this Act, "total income" means the aggregate of all sources of income including the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount or unascertained as being fees or emoluments or as being profits from trade or commercial or financial or other business or calling or otherwise howsoever, directly or indirectly accrued to or derived by a person from any office or employment or from any profession or calling or from any trade, manufacture or business or otherwise howsoever, as the case may be_*

Provided that, without in any way, affecting the generality of this section, "total income", for the purpose of this Act, shall include-

(a) any profit or gain accrued or derived from the sale or other disposition of any real or personal property or any interest therein, if the business of the taxpayer comprises dealing in such property, or if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it, and any profit or gain derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit but nevertheless, the profit or gain derived from a transaction of purchase and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business shall be excluded."

[7] It is generally accepted that the general definition of total income did not include capital gains reflecting the view that the normal or usual proceeds of a business are included in its taxable profit or income but that capital receipts or capital profits are not. The accepted test for distinguishing income profit from capital profit for the purposes of determining total income was discussed in **Californian Copper Syndicate –v- Harris** (1904) 5T.C. 159. The test was applied by the High Court of Fiji in **Commissioner of Inland Revenue –v- C.Roose (Fiji) Limited** (1962) 8 Fiji LR 94.

[8] The facts of that case are interesting in that there is some similarity with the facts of the present case. In **Commissioner of Inland Revenue –v- C.Roose (Fiji) Limited** (supra) the company began to operate as an investment company in 1951. In 1953 it resolved that the available funds of the company should be invested by the directors in sound securities. From 1951 to 1960 only two sales of shares by the company took place and

the profits from those sales were assessed by the Commissioner as part of the income of the company for the year 1960. The Court of Review held that the realization of the two share investments was not a normal or necessary step in the investment business carried on by the company and that the profits thereon were not assessable as income. The Commissioner appealed and the then Supreme Court (now the High Court) affirmed that the two particular sales were merely realization of investments. The Court applied the test in **Californian Copper Syndicate –v- Harris** (supra) to determine whether profits were capital gains or income. The test applied was whether the profits arise from the realization by the owner of an ordinary investment, or from a realization which is an act done in what is really the carrying on, or the carrying out, of a business. The Court considered that the test required that the circumstances giving rise to each sale must be considered individually on their merits to ascertain whether it is a normal trading transaction or a genuine change of investment made for a specific purpose other than sale with a view to profit in the normal course of the company's trading transactions.

[9] It should be noted that in paragraph 20 of the agreed statement of facts signed by the parties and filed in the Registry on 11 November 2011 it was expressly stated that the respondent sought to levy income tax on the sale of shares under section 11 (a) of the Income Tax Act Cap 201. The reference to section 11(a) must be taken to be a reference to proviso (a) of section 11 and therefore the assessment to pay income tax was not made under the general definition in section 11.

[10] Turning then to proviso (a) to section 11, the purpose of which was to extend the definition of total income to real and personal property undertakings and schemes that do not fall within the general definition in section 11. It appears not to be in dispute that proviso (a) to section 11 (now referred to as section 11(a)) had 3 limbs followed by an exclusionary qualification that applied to all 3 limbs. It appears from the written submissions filed by the respondent that there is no challenge to the summary of the 3 limbs set out in the appellant's written submissions at paragraph 44. The three limbs that brought profits into income under section 11(a) were:

"(i) *profits on the sale or other disposition of property were taxable as income "if the business of the tax payer comprises dealing in such property (first limb)*

(ii) *profits on the sale or other disposition of property were taxable as income "if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it (second limb)*

(iii) *profits on a sale of property from the carrying on, or carrying out, of an undertaking or scheme entered into devised for the purpose of making a profit (third limb)."*

[11] It appears also to have been accepted that the qualification at the end of section 11(a) expressly excluded *"the profits or gain from a transaction of purchase and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business"* from all 3 limbs even if a transaction might otherwise have been caught within one of the limbs.

[12] The parties sought to limit the scope of the issues in dispute when they signed the statement of agreed facts in November 2011 prior to the commencement of the hearing in the Tribunal. Under the heading of "Issues already disposed of" in paragraph 24 it is stated that *"the respondent had indicated that it accepts that the taxpayers John Malcolm Hill and Malcolm Griffith Brain do not deal in shares according to section 11(a) of the Income Tax Act Cap 201."* And then in paragraph 25 of the agreed facts it is stated that *"(T)he respondent has indicated that it accepts that the said taxpayers did not acquire the shares for the purposes of sale since it held them for some 24 years."* These concessions had the effect of indicating that the taxpayers were not liable for the profits from the sale of their shares under limbs (1) and (2) of section 11(a) of the Act.

[13] It is appropriate at this stage to consider the legal effect of the concessions that have been made by the respondent in the statement of agreed facts. The effect of the concessions is that the only issue for determination by the Tribunal was whether the appellants were liable under limb (3) of section 11(a) and if so was that liability excluded by virtue of the qualification that appears at the end of section 11(a). The parties clarified the matter

beyond doubt when they agreed that the only issues to be determined by the Tribunal were (1) whether profit from the sale of shares in CPL derived from the carrying on or carrying out of any undertaking or scheme entered into for the purpose of profit and (2) if the profits do so derive, whether the transactions falls within the exception to the third limb of section 11(a): *"the profit or gain derived from a transaction and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business shall be excluded."*

[14] In the judgment delivered on 22 January 2018 the Tax Court concluded that the factual and legal situation pointed to the appellants carrying on a trading or business transaction. The Court dismissed the appeal and upheld the respondent's assessment of income tax to be paid by each appellant.

[15] The notice of appeal was filed in the Court of Appeal registry on 2 March 2018 and within the time permitted under section 109 of the Tax Administration Act as amended in 2016. The appellants seek an order that the judgment and orders of the Tax Court be set aside. In addition, further consequential orders are sought and the grounds upon which the appellants rely are as follows:

> *"1 The Learned Judge erred in law in deciding that the pivotal question for his decision was whether the profits were derived from a business entered into for profit and, if so, whether these profits were excluded from tax because they were derived from a transaction which was not a trade or business when –*
>
> *(a) the first limb of section 11(a) of the Income Tax Act 1974 (repealed) ("ITA") only applied where the taxpayer was conducting a business of dealing in the type of property that had been sold or disposed of, and giving rise to the profit in question;*
>
> *(b) the relevant type of property in this case was shares;*
>
> *(c) the Respondent had accepted in the Tribunal below, that the Appellants were not in the business of dealing in shares; and*
>
> *(d) the Respondent had also accepted that the Appellants were not in the business of dealing in land.*

2. *The Learned Judge erred in law in deciding that "the Appellants were not merely selling their shares, they were also selling the asset of CPL, the land, which is not something that shareholders do when they are selling only their shares."*

3. *The Learned Judge erred in law in finding that the property in question had been acquired by the Appellants for the purposes of selling it when the time was right, when –*

   (a) it was CPL, not the Appellants, which had acquired the property;
   (b) the Learned Tax Tribunal below had found that "the purpose of Taxpayers A and B was to develop an integrated resort. That had become the business of Company C";
   (c) the Respondent had not appealed against that finding;
   (d) it was therefore not open to the Learned Judge to find as he did.

4. *The Learned Judge erred in law –*

   (a) in finding that "the transaction from start to finish was the purchase and sale of a property which was in itself in the nature of a business of both Appellants"; and
   (b) in the manner in which he applied the case of California Copper Syndicate Limited v Harris (1904) 5 TC 165 and 167;
   (c) in deciding that the business of CPL was exclusively a business undertaking conducted by the Appellants themselves in their personal capacities as individuals;
   (d) in deciding that the corporate veil could be pierced because Chater Properties Limited ("CPL"), the company owned by the Appellants, was only a façade and that the Appellants were in partnership behind the façade of CPL;
   (e) in the manner in which he applied the cases of Dennis Wilcox Pty Limited v Federal Commissioner of Taxation (1988) 79 FLR 267 and Pioneer Concrete Services Ltd v Yelnah Pty Ltd (1986) 11 ACLR 108, and
   (f) in failing to consider and apply the cases of Milne v Federal Commissioner of Tax [1975-76] 133 CLR 526 and Commissioner of Inland Revenue v Property Nominees Unreported Ct App. Civil Appeal NO 44 of 1985 cited to him by the Appellants.

5. *The Learned Judge erred in law –*

   (a) in the manner in which he applied the general provision and paragraph (a) of Section 11 of the ITA and the exclusionary proviso to paragraph (a);

(b) in treating the Appellants as having sold the land belonging to CPL, rather than their shares in CPL;

(c) in concluding –

> *"32. In my considered opinion once the corporate veil of CPL is lifted it becomes crystal clear that its business was that of the 2 Appellants and thus the sale of their shares in CPL as well as the sale of the land in the one and the same transaction results in both Appellants coming within the ambit of s.11 and proviso (a) (but not within the exclusion) as follows.*
>
> *(1) It is an income being profits from a business*
> *(2) It is a profit or gain derived from the sale of shares and of the land where the (CPL) business of the taxpayers/Appellants comprises dealing in such property (the Land).*
> *(3) It is a profit or gain derived from carrying on out of a scheme (development of an island resort) entered into or devised for the purpose of making a profit.*
> *(4) The profit or gain from the purchase of the land and the sale of the shares and the land were a transactions which was a business of the Appellants. In the event it was income, but not income which was excluded from tax."*

6 The Learned Judge should have held that –

(a) the Leaned Tax Tribunal erred in law in interpreting the general provision of section 11 and the exclusionary proviso in section 11(a) of the ITA and by, among other things –

- *(i) holding that the provisions of section 11(a) have only two limbs which was inconsistent with settled law of Fiji;*
- *(ii) holding that the Appellants' profit arising from the sale of shares was caught by the general provision of section 11 of the Act;*
- *(iii) finding that the Appellants' profit from the sale of their shares was "derived from the carrying on or carrying out of an undertaking or scheme entered into for the purpose of making a profit" within section 11(a) of the Act;*
- *(iv) erroneously applying the overriding exclusion to section 11(a) of the Act which provides that income is not taxable where the gain or profit derived from the transactions of purchase and sale:*
  - *(i) does not form part of a series of transactions; and*
  - *(ii) the transaction is not in itself in the nature of trade or business;*
- *(v) by ascribing to the Appellants the business of their companies JS Hill and Associates and wrongly focusing on the land*

development transactions carried out by CPL instead of the Appellants' share transaction.

(b) The Appellants' profit on the sale of their shares was a capital gain arising from the increase in value upon the realization of the shares in CPL and not income from the carrying on or carrying out by the Appellants' individually of any trade or business.
(c) The profit was not from the operation by the Appellants individually in carrying out a scheme for profit-making and was not taxable under section 11 of the ITA;
(d) Alternatively that the profit fell within the exclusionary proviso of section 11(a) of the ITA;
(e) The Respondent should refund the income tax collected from the Appellants on the sale of their shares."

[16] It is appropriate at this point to recall that this Court's jurisdiction in this appeal is restricted to considering those grounds of appeal that involve a question of law only under section 3(4) of the Court of Appeal Act. Section 109(2) of the Tax Administration provides that the Court of Appeal Act with necessary modifications shall apply to appeals from the Tax Court. There is no provision in the Tax Administration Act that would require any modification to the application of section 3(4) of the Court of Appeal Act to the present appeal. In that context it is necessary to distinguish between the original jurisdiction of the Tax Court and its appellate jurisdiction.

[17] As a division of the High Court pursuant to section 90 of the Tax Administration Act exercising its appellate jurisdiction it is necessary to apply the jurisdictional limit for appeals to this Court under section 3(4) of the Court of Appeal Act. On the other hand, any appeal from a final judgment of the Tax Court exercising any aspect of its original jurisdiction under section 91 of the Tax Administration Act lies as of right on questions of fact, mixed fact and law and law alone.

[18] This appeal can be regarded as raising three issues. The first is whether the profit from the sale of the appellants' shares is income under the general definition of total income in section 11 of the Income Tax Act Cap 201 (now repealed). The second issue is whether the profits are caught by the third limb of section 11(a) of the Income Tax Act. The third

issue is whether the profits, if regarded as income, were covered by the qualification at the end of section 11(a).

[19] Under the general definition of total income and for the purposes of this appeal section 11 provides, amongst other things, that total income includes "*_ _ _ profits from a trade or commercial or financial or other business or calling or otherwise howsoever, directly or indirectly accrued to or derived by a person from any office or employment or from any profession or calling or any office or employment or from any profession or calling or from any trade manufacture or business _ _ _*."

[20] It is appropriate to recall that prior to the hearing before the Tribunal the respondent had expressly acknowledged in the signed statement of agreed facts that it had sought to levy income tax on the sale of the shares under section 11(a) of the Income Tax Act Cap 201. It follows that the respondent's position before the Tribunal was that the profits were not caught under the general definition in section 11.

[21] The effect of an agreement in writing by the parties as to a matter arising out of a proceeding before the Tribunal is the subject of section 85 of the Tax Administration Act. That section provides that the Tax Tribunal may, in its decision in the proceeding, give effect to the terms of the agreement. The word "*may*" is often the subject of deliberation by courts engaged in statutory interpretation issues. In this case I venture to conclude that the effect of the provision is that the Tax Tribunal is permitted to take into account the terms of the agreement rather than is required to take the terms of the agreement into account.

[22] Relying on sections 17 and 85 of the Tax Administration Act the Tribunal had concluded that it was not bound by either the legal limits or the factual limits that might otherwise have restricted the Tribunal as a result of the filing of a statement of agreed facts and issues. Although this is not an issue that is the subject of appeal in this Court I do feel compelled to state that the view taken by the Tribunal is not helpful in the sense that it effectively discourages parties in complex cases from assisting the Tribunal by limiting

the legal issues involved and the facts that remain in dispute. This is particularly so when there are no pleadings or material to otherwise define the parameters of the proceedings or the scope of relevant evidence.

[23] The Tribunal applied the general definition of income that is reflected in section 11 relying on the decision of **Commissioner of Inland Revenue –v- C Roose (Fiji) Limited** (1962) 8 Fiji LR 94 and concluded that *"the profits arising from the sale of shares in CPL were profits from the taxpayers business or otherwise howsoever directly or indirectly accrued to or derived ___ howsoever as the case may be."*

[24] It must be observed however that the Tribunal's conclusion on this aspect is not supported by any serious analysis of the wording of section 11 nor of the transaction itself. The Tribunal's conclusion was initially described in paragraph 53 as:

> *"At first blush the sale of the taxpayer's shares in company C (CPL), given their direct involvement in the running of that company and its business, renders such profits "income" for the purposes of the Act."*

[25] The same conclusion is re-stated in the decision on at least one other occasion. However apart from a brief discussion of some case authorities there is no further development of the argument in support of that conclusion. The Tribunal then proceeded to consider the position under section 11(a). The Tribunal was of the opinion that section 11(a) has only two limbs. However in their submissions to this Court the parties remain of the view that section 11(a) provides for three separate circumstances under which profits may be included as total income. In my judgment, although not directly before this Court as an issue, the submissions by the parties more accurately reflect the meaning of section 11(a). The Tribunal made no finding as to liability under what was referred to as the first limb.

[26] The Tribunal described the second of the two limbs as having the effect of catching profits as income when *"any profit or gain is derived from carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit."*

[27] In written submissions before this Court the respondent submitted in paragraph 19 that *"the second limb being referred to by the Tribunal at paragraph 76 is the third limb and captures the profit acquired from the sale of shares as taxable."* The appellants also argued that there were 3 limbs to section 11(a) but that the transaction was not caught by the third limb or alternatively if the profits were caught by the third limb, they fell within the qualification for which there is provision in section 11(a).

[28] The Tribunal concluded that the profits were caught also by this limb of section 11(a). The Tribunal appears to place some relevance on the decision of **Commissioner of Taxation –v- Whitfords Beach** (1982) 150 CLR 355. The Tribunal quotes a passage from the judgment of Gibbs CJ at paragraphs 88 of its decision:

> *"In deciding whether what was done was an operation of business, it is relevant to consider the purpose with which the taxpayer acted, and since the taxpayer is a company, the purposes of those who control it are its purpose."*

[29] However, in the present appeal the company is not the taxpayer. The two shareholders were assessed as being liable to pay income tax on the profits from the sale of their shares. Ownership of the company was transferred by the sale of the shares but the Vulani land continued to be owned by CPL, a separate legal entity. While the value of the shares in the company may well reflect the value of the only asset belonging to the company, the owners of the shares and the owner of the land are separate legal entities whose tax liabilities may not necessarily be the same in relation to the disposal of their respective capital assets.

[30] On appeal the Tax Court approached the issue from an entirely different perspective. The question that the Tax Court considered to be the central issue on appeal was:

> *"___ were the profits on the sale of their shares by the appellants derived from a business entered into for profit and if so were these profits itself excluded from tax because they were derived from a transaction which was not a trade or business."*

[31] It would appear that the Tax Court took the approach that the appeal concerned the third limb of section 11(a) and the application of the qualification that would otherwise have excluded the profits from any income tax liability. In determining the appeal the Tax Court first considered the promotional material prepared for the development of the Vulani land by CPL. The Court then considered the sale and purchase agreement between the appellants and Highway Stabilizers Trust Company Limited for the sale of the shares.

[32] The Court found that the appellants were not only selling their shares they were also selling the only asset of CPL, the Vulani land. The Court took the view that the appellants never had access to the capital that was needed if they were truly contemplating the construction of a hotel/island resort. The Court concluded that the appellants used CPL to purchase the Vulani land for the sole purpose of selling the same land when the time "*was ripe*". The sale of the shares was a disguise for the sale of the land. The Court, however, felt compelled to determine whether the respondent was entitled to impose the tax on the shareholders rather than on CPL given "*the well-established legal principle that a limited company and its shareholders are separate and distinct legal entities.*" On that point the Court found that although there was a company, CPL, involved, in truth this was entirely and exclusively a business undertaking conducted by the appellants themselves in their personal capacities as individuals. The Court found that the corporate veil provided by CPL was merely to hide or obscure the fact that this was in reality a partnership of the two appellants.

[33] As a result the Court concluded that the profits came within section 11 and 11(a) for the following reasons:

> "*(1) It is an income being profits from a business*
> *(2) It is a profit or gain derived from the sale of shares and of the land where the (CPL) business of the taxpayers/appellants comprises dealing in such property (the land)*

(3) *It is a profit or gain derived from carrying on or out of a scheme (development of an island resort) entered into or devised for the purpose of making a profit*

(4) *The profit or gain from the purchase of the land and the sale of the shares and the land were a transaction which was a business of the appellants. In the event it was income, but not income that was excluded from Tax."*

The Court dismissed the appeal and upheld the assessment made by the respondent.

[34] Initially, the position taken by the respondent was that the assessment was made under the third limb of section 11(a). In other words any liability to pay income tax on the profits from the sale of shares by the appellant arises under the third limb of section 11(a). The respondent then argued that the liability also arises under the general definition of total income under section 11. In my opinion that is a stance taken by the respondent only after the decision of the Tax Tribunal that was subsequently affirmed by the Tax Court. That is a conclusion with which I find myself unable to accept. That issue together with the application of the third limb of section 11(a) require a review of the undisputed facts.

[35] CPL was incorporated in 1975. The appellants acquired the shares in CPL in 1981. The shares were held equally by the appellants thereafter, either directly or indirectly. In 1995 CPL acquired for $300,000 two parcels of land known as the *"Vulani land."* The land was acquired on a mortgage sale from the ANZ Bank. The land was state land and had been granted to the previous owners in 1990. The proposed lessee (CPL) was required to reclaim and develop the land for hotel, resort, residential, condominium, commercial and other similar recreational tourist ventures in 3 phases.

[36] Although the initial purpose of CPL was as an investment company, after the acquisition of the Vulani land in 1995, the purpose became property development. Between 1995 and the sale of the shares in July 2006 CPL had spent $4.2m on works associated with the integrated development of the land. The appellants also engaged resort development finance experts to assist in finding investors and attempted to negotiate favourable investment incentives with the Government.

[37] The sale of the shares took place some 25 years after acquisition. The reasons given by the appellants for selling the shares in 2006 included the 1999 election defeat of the Rabuka government, the political upheavals in Fiji in 2000, the subsequent significant slowdown in tourism and the lack of available investment funds and/or investors.

[38] The unchallenged finding by the Tribunal was that the *"purpose of the appellants was to develop an integrated resort. That had become the business of company C."*

[39] Thus the sale of the shares in CPL by the appellants was the sale of shares in a company the business of which was to develop an integrated resort. This business was the only business of CPL and the project of developing the Vulani land into an integrated resort was the only business which CPL had undertaken. There was no evidence that the appellants were engaged in the business of buying and selling shares. There was no evidence that CPL had engaged in any other commercial or business activity other than the development of one integrated resort on the Vulani land. The value of the shares had increased significantly over the years since they were acquired in 1981 and more particularly following the purchase by way of a mortgagee sale, of the Vulani land in 1995. The profit that was derived by each appellant was derived from the realization of a capital asset by way of a single act of selling shares in CPL that had been acquired by the appellants.

[40] In my judgment the profit derived by each appellant from the sale of the shares could not be described as net annual profit from a trade or commercial or financial or other business. The general definition of total income is intended to catch profits derived by taxpayers who are in the business of trading in or dealing with capital assets as the dominant purpose. I am therefore satisfied that the respondent's initial position was correct when it accepted that the profits were not caught by the general definition of total income in section 11. In this case the dominant purpose was the development of an

integrated resort. This was a finding of fact made by the Tribunal. It was not open to the Tax Court sitting as an appeal court to reach a different finding of fact.

[41] The respondent appears to have maintained its initial position that the appellants are not caught under the first or second limb of section 11(a). It is claimed that they are, however, caught under the third limb of section 11(a). In this case the shares in CPL were acquired by the appellants in 1981. The Vulani land was acquired by CPL in 1995. The Tribunal accepted that CPL had acquired the land for the purpose of developing an integrated resort. The question that arises under this third limb is whether the appellants were carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit. The evidence established that there was the acquisition of shares in CPL by the appellants, there was an acquisition by CPL of the Vulani land and the subsequent sale of the shares in CPL some 11 years after the land was purchased. The value of the shares sold reflected the value of the land and the development works undertaken by the appellants as at the date of the transfer of shares. In my opinion the decision of the Privy Council in **McClelland v FCT** (1970) 120 CLR 487 provides guidance for determining what is a scheme or undertaking entered into or devised for the purpose of making a profit. The Privy Council pointed out that all schemes to produce a profit could be caught by this limb of section 11(a) if given a liberal construction. The Privy Council considered that what was required was something in the nature of a business deal. I am not prepared to regard the appellants' sale of their shares as a business deal or as a scheme entered into or devised for the purpose of making a profit, so as to come with the third limb of proviso(a) to section 11. The transaction, as previously noted, is more appropriately described as the simple realization of an asset. I also have concluded that the sale of the shares cannot be regarded as a dealing in land. The isolated events that have occurred over a period of some 25 years could not be regarded as part of a plan or scheme or undertaking let alone as amounting to a business deal. The circumstances of each sale must be considered on its merits to ascertain whether it is a normal trading transaction or a genuine change of investment.

[42] I should also go one step further and add that even if it is accepted that the appellants' profits are caught by the third limb of section 11(a), I am satisfied that the exclusionary qualification applies in this case. This is because it is obvious that the purchase of the shares in 1981, the purchase of the land in 1995 and the sale of the shares in 2006 did not form part of a series of transactions and nor was it in itself in the nature of trade or business. The appellants as taxpayers were not engaged in a trade or business of purchasing and selling shares. This was a once only purchase and sale of a capital asset in the form of shares that had been in the possession of the appellants for many years.

[43] It is not necessary for me to consider individually each of the many grounds of appeal raised by the appellants. I am satisfied that the Tax Court erred in law when it concluded that the profits derived from the sales of shares rendered the appellants liable to pay income tax under section 11 and/or section 11(a) of the Income Tax Act Cap 201.

[44] Therefore I would allow the appeal and set aside the judgments of the Tax Court and the Tax Tribunal. I would order that the respondent refund to each appellant the sums paid under the amended assessments for the tax year ending 2006.

[45] The appellants claim interest on the amounts to be refunded from the date the payments were received by the respondent. This is referred to as pre-judgment interest. The submissions on interest by the appellants are extremely brief and appear at paragraph 204 of the written submission. Perhaps not surprisingly the respondent has not made any submissions on the question of interest.

[46] There is no provision in the Income Tax Cap 201, the Income Tax Act 2015 nor in section 33 of the Tax Administration Act 2009 that provides for the payment of interest on refunds of tax required to be made by the respondent. On the other hand, section 67 of the Value Added Tax Act 1991 does provide for the payment of interest under certain circumstances on account of a late refund of VAT payments.

[47] The appellants claim that interest is payable under section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935. However the opening words of that section state:

> *"3 In any proceedings tried in the High Court for the recovery of an debt or damages ___"*

[48] In my judgment section 3 does not permit the High Court sitting as the Tax Court in its appellate jurisdiction nor this Court to award interest to successful appellants who are entitled to have income tax refunded as a result of an error or law.

[49] In support of their claim for interest under section 3 of the last mentioned Act, the appellants rely on the decision of this Court in **Vergnet SA –v- Commissioner of Inland Revenue** [2013] FJCA 51; ABU 35 of 2010, 30 May 2013. The issue of interest was not discussed at all by the Court of Appeal and the award of interest was included as a result of the Court's order that the appellants were entitled to the relief 1, 2 and 3 as claimed. Furthermore, proceedings in **Vergnet** were commenced by Originating Summons and as a result came within the requirements of section 3. However, there were no observations as to when the appellant in that case became entitled to the refund.

[50] In my judgment the decision in **Vergnet SA** does not provide a sound basis for a claim for interest in the present case.

[51] The appellants also referred to the decision of **Woolwich Buiding Society –v- Inland Revenue Commissioners** (No.2 [1992] 3 All ER 737 (HL). However that decision is authority for the proposition that money paid by a taxpayer to a public authority in the form of taxes pursuant to an utltra vires demand by the authority was prima facie recoverable immediately by the taxpayer as of right at common law together with interest thereon. A payment of tax made pursuant to a demand under a law (in the form of Regulations) that was made ultra vires gives rise to a cause of action to recover the payment as a debt due to it on the date when it was made. Under those circumstances the

House of Lords by a majority held that the Court has power to award interest from the moment the cause of action arose by virtue of section 35A of the Supreme Court Act 1981.

[52] However that decision can be distinguished. In the present case the payment by the appellants of income tax to the respondent was made under a law (the Income Tax Cap 201) the validity of which was never brought into question. As a persuasive authority that decision does not in my judgment assist the appellants' claim for interest. The House of Lords cannot be said to have applied the same principle to payments made by tax payers under a mistake of law. Furthermore it may be that scope to award interest on a debt under section 35A of the Supreme Court Act in the UK is wider than the scope under section 3 of the Miscellaneous Provisions Act of 1935 in Fiji.

[53] The Court did not have the benefit of Counsels' submissions on the effect of the House of Lords decision in **Sempra Metals Ltd –v- Inland Revenue Commissioners and Another** [2008] 1 AC 561. As a result I am not prepared to consider whether that decision would in any way assist a claim for the awarding interest in the present case. For all the above reasons, I would refuse the award of pre-judgment interest in the present case.

[54] There is no requirement for the Court to specifically award post-judgment interest which is recoverable as of right from the date of judgment to the date of payment under the circumstances set in section 4 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935.

[55] Finally, I have concluded that both parties should pay their own costs in the Tribunal, the Tax Court and in this appeal.

Chandra JA

[56] I agree with the reasoning, conclusions and proposed orders of Calanchini P.

Jameel JA

[57] I have had the benefit of reading the draft judgment of Calanchini P and agree with his reasons and conclusions.

Orders

1. *The appeal is allowed.*
2. *The judgments of the Tax Court and the Tax Tribunal are set aside.*
3. *The Respondent is ordered to refund to each appellant the sum paid under the amended assessment for the tax year ending in 2006.*
4. *The parties are to pay their own costs in the proceedings in the Tribunal, the Tax Court and in this appeal.*

Hon. Mr Justice W Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Mr Justice S Chandra
JUSTICE OF APPEAL

Hon. Madam Justice F Jameel
JUSTICE OF APPEAL